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Supreme Court of the United States.

October Term, 1898.

ALBERT WADE, Petitioner,

vs.

TRAVIS COUNTY, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR TRAVIS COUNTY.

FRANZ FISET,
CLARENCE H. MILLER,
Of Counsel for the County of Travis, Respondent.

BYRON S. ADAMS PRINTING CO., WASHINGTON.

No. 267.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR TRAVIS COUNTY.

STATEMENT OF THE CASE:

This case was decided in the trial court against the plaintiff below and petitioner in this court, Albert Wade, on a general demurrer. It appears from the petition that he sued as the owner and holder of the coupons representing the interest due on all of the forty-seven bonds issued by Travis County to the King Iron Bridge and Manufacturing company for building a bridge across the Colorado river, that while the contract for building the bridge provided that the work should begin August 3rd, 1888, and the bridge be completed November 15th following, it is stated that pursuant to the terms of the contract, the county on December 6th, 1888, executed and delivered five of the bonds; on December 22nd, 1888, ten of the bonds; on February 12th, 1889, ten more; on July 3rd, 1889, caused the twenty-two remaining bonds to be issued and delivered; and that each bond bore the date on which it was delivered. A copy of the bond was not set out nor was it alleged, as in Mitchell County vs. Bank, 39 S. W., 628, that it appeared on the face of the bonds that they were issued under act of April 4th, 1887. It was not alleged that any provi-

ion was made at the time of creating the debt for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent as a sinking fund; nor was it alleged, as in the case of Mitchell County vs. Bank, 91 Tex., 366, "that all of the said bonds were issued according to the laws of the State of Texas, which authorized their issue." The defendant countydemurred to the petition, among other things, because it contained no allegation that at the time the debt was created, for which the bonds were issued, provision was made for the interest and sinking, as required by section 7, article 11, of the the Constitution of Texas. The Circuit Court's opinion in the case will be found in 72 Fed. Rep., page 985. The court, in the opinion, states what was the contention of the plaintiff in the circuit court. It was, that in making the general levies of taxes stated in the petition, the county intended to provide a sinking fund and interest on the bonds in question. Plaintiff did not take the position nor raise the question in that court that is now presented in this court. We do not understand petitioner to state under subdivision IV, page 4, of his petition to the contrary. The case was affirmed on writ of error by the Circuit Court of Appeals for the Fifth Circuit on June 6th, 1897 (81 Fed. Rep., 742,). It appears from the opinion of the Circuit Court of Appeals that the contention of the plaintiff in error was (1) that the language of the last clause of said section 7, article 11, of the Constitution must be read in connection with the preceding portion of the section, and be held to apply only to counties bordering on the coast of the Gulf of Mexico; (2) that in the case of City of Waxahachie vs. Brown, 67 Tex., 519, the Supreme Court of Texas had taken that view of the last clause of section 7, and restricted its application to counties bordering on the Gulf, and that construction entered into and became a part of the contract for building the bridge and issuing the bonds in question. Both these positions are abandoned in this court. As to the first contention, on page 13 of the brief for petitioner, it is said "the Supreme Court of Texas assumed for the purpose of the Mitchell County case, that the above quoted article was applicable to the indebtedness then in question, and we shall make a like assumption in this case." No reference whatever is made in the argument to the case of City of Waxahachie vs. Brown and the

Circuit Court of Appeals construction of it is apparently satisfactory to petitioner.

The assignments of error are so very general and brief that no idea of the specific point intended to be covered can be satisfactorily gathered from them.

In view of the question that will arise during the argument as to whether Travis County has acquired any rights under the construction of section 7, article 11, of the State Constitution that obtained in both State and Federal Courts prior to the Mitchell County case, it is necessary to refer to the petition for certiorari and record filed in this court on April , 1899, in cause No. , Travis County, petitioner, vs. King Iron Bridge and Manufacturing Co.

The bridge company and the county had a controversy before the bridge, in consideration of the construction of which the bonds in question were issued, was accepted and the last twenty-two bonds were issued, as to whether the bridge was as high as required by the terms of the contract, and in compromise the respective parties entered into a new contract whereby, in consideration of the County issuing the remaining twenty-two bonds, the Bridge Company gave to the County an indemnity bond guaranteeing that the bridge should stand all floods in the river below a certain height for a period of ten years. The bridge was washed away by a lower flood within a few months after the indemnity bond was given, and the County brought suit in the United States Circuit Court for the Western District of Texas, upon the bond against the Bridge Company. The Bridge Company defended the suit upon the ground that the indemnity bond was without consideration, because the County bonds were void under section 7, article 11, of the Constitution. The Circuit Court, following the decisions of the Supreme Court of the State, sustained this defense, and July 13th, 1893, entered judgment for the defendant. The County recognized that the same rule of comity would lead the Circuit Court of Appeals and even this court to follow the jurisprudence of the highest State Court, and submitted as it had to do to that decision until after the writ of certiorari was granted in this case, when it applied for the writ of certiorari from the Circuit Court of Appeals for the Fifth Circuit. That Court denied the writ on the ground that it had no author-

ity to issue such writ, and further held that no relief was open to the County, because so great a time had elapsed since the entry of the Circuit Court's judgment in the case. The opinion of the Court of Appeals is in the record of the case. The case is now pending before this Court on writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, or the United States Circuit Court for the Western District of Texas.

I.

The judgment in this case should be affirmed, because in rendering it the Circuit Court followed the construction of section 7, article 11, of the State Constitution at that time adopted by the highest State Court. The opinion in the case was handed down by the Circuit Court on March 13th, 1896, and by the Circuit Court of Appeals on June 16th, 1897. The Mitchell County case was decided on January 10th, 1898.

Section 7, article 11, of the Constitution was first construed by the Texas Supreme Court on November 16th, 1888, in the case of City of Terrell vs. Dessaint, 71 Tex., 770; then followed, on December 5th, 1890, Citizen's Bank vs. City of Terrell, 78 Tex., 450; on November 4th, 1891, Biddle vs. City of Terrell, 82 Tex., 335; on April 15th, 1895, Bassett vs. City of El Paso, 88 Tex., 168; on December 23rd, 1895, McNeal vs. City of Waco, 89 Tex., 83; on November 30th, 1896, Howard vs. Smith, 91 Tex., 8. These cases all involved the question as to the powers of cities, under section 7, article 11, of the Constitution, but in view of the language of that section, the principle was plainly binding in the case of counties. This view was repeatedly held by the Federal Circuit Courts in Texas and the Federal Court of Appeals for the Fifth Circuit. The question in the Federal Court first came up in the suit already referred to of Travis County against The King Iron Bridge and Manufacturing Company, wherein the Court, in July, 1893, held the identical bonds issued by Travis County invalid. The next case was Quaker City National Bank vs. Nolan County, 59 Fed Rep., 660, decided January 31st, 1894. The Court in that case held the County bonds void because no provision had been made by the commissioners court at the time the bonds were issued, to assess and collect a sufficient sum to pay the interest and sinking fund. The Circuit Court of Appeals in that case, on

December 11th, 1894, 66 Fed Rep., 883, said: "The questions involved in this case are not open questions in this court. On reasoning which we have approved and still consider sound and sufficient, both of the final propositions submitted, have been decided by the Supreme Court of Texas adversely to the contention of plaintiff in error." Again, in Brazoria County vs. Youngstown Bridge Company, 80 Fed Rep., 10, the Circuit Court of Appeals held that bonds issued by the County to construct a bridge were not binding if no provision was made by the proper county authorities at the time the bonds were issued as required by section 7, article 11, of the Constitution. And again, in the case at bar, the Circuit Court of Appeals, 81 Fed. Rep., 742, held that the question was not an open one under the said decisions. After all of these decisions had been rendered the qustion for the first time was raised in Mitchell County vs. Bank, 91 Tex., 361, as to whether the general law did not make the necessary provision, and thus render it unnecessary for the County authorities to do so. In view of this state of the state and federal decisions, we submit that the judgment of the circuit cour was not erroneous, and to reverse it on account of the Mitchell County decision would be contrary to principle and authority.

Gelpcke vs. City of Dubuque, 1 Wallace, 175, is in point. From that case it appears the Supreme Court of Iowa in a number of decisions upheld certain bonds issued to railroads by the municipal corporations of the state, but finally held that bonds issued under similar circumstances were not valid. This court declined to follow this latest state decision, and upon the authority of the earlier decisions upheld the bonds. The court said as to the earlier decisions: "We shall be governed by them unless there be something which takes the case out of the established rule of this court upon that subject. * * * It is urged that all these decisions have been overruled by the Supreme Court of the State in the late case of the State of Iowa vs. County, and it is insisted that in cases involving the construction of a state law or constitution this court is bound to follow the latest adjudication of the highest court of the state. * * * However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past." There was an elaborate dissenting opinion in which it was said, among other things, "In the present case, the court

rests on the former decision of the state court, declining to examine the constitutional question for itself."

In Railway Company vs. Twombly, 100 U. S., 81, a judgment for damages was recovered in the lower court, under a statute of the Territory of Colorado. While the case was pending on writ of error in this court, the statute was repealed, and it was urged that the judgment should be reversed with instructions to the court below to dismiss the suit. This court declined to do that and said: "A writ of error to this court does not vacate the judgment in the court below; that continues in force until reversed which is only done when errors are found in the record on which it rests, and which were committed previous to its rendition. Here there are no such errors."

In Rowan vs. Runnells, 5 Howard, 134, the court, in speaking of the decision of the state courts on their own constitution and laws, said: "But we ought not to give them a retroactive effect," etc. In Shelton vs. Hamilton, 23 Miss., 498, the court, in speaking of following the decisions of this court, when they are in conflict with its own, said: "We feel bound to adhere to our own decisions * * * Retrospective legislation has always been deemed unjust and oppressive. Whenever courts of law alter or change the rules of law they have once established, and on the faith of which, contracts have been made or rights acquired, many of the most injurious effects of retrospective legislation will follow such action.

In Hardigree vs. Mitchim, 51 Ala., 155, the court on this subject said: "When the courts have pronounced the law, and it has become known to and recognized in the community, though subsequent research and a more deliberate examination may compel a reversal of the decision, ignorance or mistake of the law cannot be invoked or imputed, to work a forfeiture of the rights acquired under the former decision. The peace of the community; the quieting of litigation; the repose of titles; the confidence judicial decisions should inspire; every consideration of policy, inducing the acceptation of the maxim that ignorance or mistake of law will not excuse, concur in compelling us not to give the decision in Martin vs. Hewitt, and subsequent cases, a retrospective operation, which would, contrary to the intention of parties, de-

feat acts done, or contracts executed, in reliance on former adjudications."

Chancellor Kent in Lyon vs. Richmond, 2 Johns. Chancery, 59, says: "A subsequent decision of a higher court, in a different case, giving a different exposition of a point of law from the one declared and known when a settlement between parties takes place, cannot have a retrospective effect, and over turn such settlement. * * * Fortunately for the peace and happiness of society, there is no such pernicious precedent to be found. This case, therefore, is to be decided according to the existing state of things when the settlement in question took place."

Wells, in his work on Res Adjudicata and Stare Decisis, section 528, says: "As to the effect of overruling decisions, it is necessary whenever practical, to prevent the overruling from operating on vested rights already attached; and where this cannot be done, the change should always be left to the legislature."

Rights have grown up under the law construed by the state and federal courts prior to the Mitchell County decision. The County failed in its cause of action against the Bridge Company under that view of the law; the federal circuit court held that it could not recover on the indemnity bond, because its own bonds given in consideration therefor were void under section 7, article 11, of the constitution. It would have been fatal for the County to have attempted to sue out a writ of error in that case, as is conclusively shown by the decisions of the circuit court of appeals in Quaker City National Bank vs. Nolan County, 66 Fed. Rep., 883; Brazoria County vs. Youngstown Bridge Company, 80 Fed. Rep., 10; and, the present case before the circuit court of appeals, in 81 Fed. Rep., 742. The judgment was rendered in this suit against the Bridge Company in July, 1893; and if the County had sued out a writ of error and the judgment had been affirmed, as it would necessarily have been, according to the decisions of the circuit court of appeals, the County would have had no right to a writ of certiorari from this court; at that time this court did not grant writs of certiorari excepting in cases of grave importance. Moreover, the chief ground of the petition for certiorari in the case at bar is the failure of the inferior federal courts to follow Mitchell County case. Therefore, the decision was irrevocably, at that time, against the County on these identical bonds,

and it should not now be denied the right of interposing the same defense in this case that was successfully interposed against it in the Bridge Company case. We therefore submit that to apply to this case the Mitchell County decision would be giving that decision a retroactive effect. The judgment of the trial court was right when rendered, because in consonance with the jurisprudence of the highest state court upon the question involved. The judgment was so far as could be known, confessedly right when made, and could not become erroneous by a change in the subsequent rulings of the state court.

We think the cases of Hoffman vs. Knox, 56 Fed. Rep., 484; Tilgman vs. Werk, 39 Fed. Rep., 680; and, King, Sheriff, vs. Dundee M. & T. I. Co., 28 Fed. Rep., 33, are applicable.

In the case in 28 Fed. Rep., 35, it is said: "While the national courts are bound to follow the settled construction given by the local court to the state constitution, I am not aware of any rule of law, or consideration of public policy, convenience or comity, that requires the former to go back and change its judgments or decrees to make them conform to the subsequent rulings of the latter. When this decree was made it was in strict conformity with the settled construction given to the state constitution by the state court so far as the later had gone, and this was all that could have been required. * * * And the subsequent contrary ruling of the state court in Crawford vs. Linn County, although a guide to this court in future cases, cannot operate retroactively and make a decree erroneous which was originally valid."

II.

The judgment of the trial court should be affirmed because it correctly decided the case upon the questions and issues as presented to it by the respective parties to the suit.

It appears that counsel raised no question as to provision being made for interest and sinking fund under the general law. It is a cardinal principle of appellate procedure, that questions of which a review is sought shall first be appropriately brought before the trial court for decision. The very idea of an appellate court makes that rule necessary. In the 2nd Encyc. of P. and P., page 516, and note z, the authorities from all of the states are collated, to the effect that a party is held on appeal to the position which he assumed below. And chapter 24 of Elliott's Ap-

pellate Procedure, beginning on page 410, is devoted to this subject, and the rule with all its limitations is fully stated. Judge Dillon expressed the doctrine in Garland vs. Holbaugh, 20 Iowa, 271, by saying: "A party cannot change his base after an appeal." This principle is fully recognized in the decisions of this court. Plaintiff does not allege in his petition as was alleged in Mitchell County case petition (91 Texas, 366) "that all of the said bonds were issued according to the laws of the state of Texas which authorized their issue," nor that the laws under which bonds were issued were expressly made part of bonds on their face (39 S. W., 628.). We therefore submit that even if this court should hold that the doctrine announced in the Mitchell County decision because it is the latest utterance of the highest state court is applicable, the plaintiff cannot invoke that doctrine for the first time in an appellate court.

III.

The first set of bonds in question were issued in December, 1888, while the case of City of Terrell vs. Dessaint, 71 Texas, 770, was decided November 16, 1888, and therefore the bonds were subject to the construction of the constitution announced in that case.

IV.

We further contend that the doctrine announced in the Mitchell County case is not sound, and should not, for that reason, be followed by this court. It is clear from the language of section 7, article 11, of the constitution that it was intended that the county authorities should at the time that any debt was created, make provision for interest and sinking fund. Any other construction would not carry out the object had in view in adopting this section of the constitution. The federal circuit court of appeals, in the cases cited, reached this conclusion in several cases in the exercise of its independent judgment, and evidently the earlier state decisions were to the same effect.

We respectfully ask that petition for certiorari be denied.

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